

Eu law – age discrimination and market access case studies.



The first request for advice from Brenda involves a scenario in which one of her employees seeks action on the grounds of age discrimination. Having traditionally allowed two of her employees to leave early every day in order to pick their children up from school, a third employee wishes to leave early in order to visit an elderly mother. Should this be disallowed, the third employee, P, plans to invoke a defence based on the wording of the relevant secondary legislation. The EU Directive of 2006 states that discrimination on 'grounds of age' is prohibited, which P claims can encompass associated persons of the employee. However the measure that has been implemented into UK national law states that employers must not discriminate against employees 'because of their age'.

Thus it would seem that the Directive would give her more rights than the UK Act, because of its broader ambit. If action is taken, the first test is whether the relevant provision is directly effective, that is, whether it creates both an obligation for Member States, and rights for the individual (C-26/62 NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v Netherlands Inland Revenue Administration), and can be invoked by said individual when taking legal action. The case of C-41/74 Van Duyn v Home Office stated that Directives are capable of Direct Effect as long as they satisfy the Van Gend en Loos criteria. Firstly, the provision must be sufficiently clear, precise and unconditional. The case of C-148/78 Pubblico Ministero v.

Ratti decided that the implementation date of the directive has to have passed, while the case of C-271/91 Marshall v Southampton ; South West Health Authority stated that there was no horizontal direct effect of

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Directives, they can only be invoked against a state or public authority. Here, the Directive is being used against B, an employer, and not a state or public authority, so it would appear the test is not satisfied, even though the implementation date has passed, and even if it is found that the provision is sufficiently clear. Furthermore, C-188/89 *Foster v British Gas* presents a test as to whether the party can be classed as a ‘public body’, which is defined as one which has been delegated power by a state to carry out a public service. With B’s business being a small, private one, it is unlikely that it satisfies this test either.

In conclusion, we establish that P’s claim is a horizontal one, thus the Directive cannot be used in a directly effective manner. Next we explore the avenue of indirect effect, created in the case of C-14/83 *Von Colson v Land Nordrhein-Westfalen*. Here it is required that the national law is interpreted in line with the Directive and here it’s clear that when interpreting the EU directive, the UK government took a purposive approach. It has been construed that the Directive was intended to confer rights on the employee rather than being as broad as to confer rights on all associated persons to the employee. The case of C-334/92 *Wagner Miret v Fondo de Garantia Salarial* accepted that harmonious interpretation is not always possible, while case C-105/03 *Criminal Proceedings Against Maria Pupino* states that there is no obligation on the MS to employ a contra legem interpretation. Thus, B can invoke the defence that there is no obligation for the UK Act to encompass associated people, as long as they are interpreted ‘only so far as possible’ (C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA*).

In conclusion, we feel to require the UK government to interpret the Directive to include rights of associated persons would equate to a contra legem interpretation, so B should be successful in using this defence should P bring action against her. B now faces a group of issues after trying to market her jewellery in other European Member States. These relate to the ‘ free movement of goods’ between Member States encompassed by the ‘ umbrella article’ of Article 26 of the Treaty of the Functioning of the European Union, intended to promote a single internal market between Member States. Member States are given the competence to regulate sale of jewellery, though the European Court of Justice has, in case law such as C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (the Cassis de Dijon case), placed restrictions on when measures that restrict the free movement of goods can be justified; through a Cassis mandatory requirement, an Article 36 TFEU derogation or if the measure relates to “ selling arrangements” (as in cases C-267/91 and 268/91 Criminal Proceedings against Keck and Mithouard). Article 34 TFEU prohibits ‘ Quantitative restrictions on imports and all measures having equivalent effect’ the first decision is whether the current issues are actual quantitative restrictions (a ban or quota on imports), or measures having equivalent effect to a quantitative restriction (MEQRs).

According to case C-2/73 Geddo v Ente Nazionale Risi, a quantitative restriction can be defined as ‘ measures which amount to a total or partial restraint of, according to the circumstances, imports, exports or goods in transit’. Case C-8/74 Procureur du Roi v Dassonville provides a broad definition of MEQRs: “ all rules enacted by Member States which are capable

of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having effect equivalent to quantitative restrictions”, and case C-109/09 *Ker Optika v Del-dunantuli Regionalis Intezete* reaffirmed this. Looking closer at the landmark *Cassis* decision, the ECJ passed three principles relating to MEQRs. The first stated that even indistinctly applicable rules could still amount to MEQRs, (measures that prima facie do not favour domestic producers). Next, the ‘Mutual Recognition’ principle was established in paragraph 14 of the judgment. It was decided that if a product is produced lawfully in one Member State, it should be possible to sell it in any other Member State.

Finally, in paragraph 8, the ECJ put forward what are known as the ‘mandatory requirements’, a list of justifications for Member States to use to defend their implementation of the measure in question. This is a non-exhaustive list but it includes “the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, and the defence of the consumer”. French law requires B to be registered as a jeweler in France, secondly to have a designated ‘finishing and polishing’ area for her jewellery. First we will assess the validity of these measures; as B will have to invest more time and money into meeting these requirements, the integration of her products into the French market is hindered.

For this reason, these measures satisfy the initial requirement of the *Dassonville* test. As of the first principle, indistinctly applicable measures can be prohibited, so Article 34, can still prohibit these measures though they don’t blatantly prejudice importers. The mutual recognition principle aims to prevent the banning of the sale of products which are lawfully produced in <https://assignbuster.com/eu-law-age-discrimination-and-market-access-case-studies/>

another Member State, even if they were manufactured according to technical and quality rules different from those that must be met by domestic products. This relates to the requirement of a 'finishing and polishing area', if the jewellery passes standards of UK law, they are of an acceptable standard to sell in any Member State. With regards to the requirement of registration, the principal is designed to prevent the need for undergoing procedures repeatedly (the dual-burden principal).

So, unless the French government can justify the measures using either a Cassis mandatory requirement or an Article 36 justification, they amount to MEQRs. From the Cassis mandatory requirements, the French government would use the 'defence of the consumer' avenue, which covers both measures, while using the public policy derogation from Article 36 to justify the culturally prized finishing and polishing stage. These justifications must now undergo a 'proportionality test', as of the case C-261/81 Walter Rau Lebensmittelwerke v De Smedt PVBA. Here it is stated that when the measure 'exceeds the requirements of the object in view, consumers may in fact be protected just as effectively by other measures'.

It then goes on to give suggestions as to what other measures could have been taken. Also, we refer back to the Ker Optika case, which also states that the legislation should be checked that it is 'appropriate for securing the attainment of the objective pursued'. Both suggest that the least restrictive measure should be taken, so, for the purposes of consumer protection, the requirement of every vendor to register is more restrictive than necessary; other methods such as a public warning campaign on, for example,

illegitimate vendors could be launched to make sure the public are aware of <https://assignbuster.com/eu-law-age-discrimination-and-market-access-case-studies/>

less genuine jewellery. On the topic of the requirement of a finishing area, we think again, for both justifications, the measure is impossibly restricting. As it is a prized craft in France, and as, of course the government want to prevent sub-standard products, the government could provide finishing and polishing services centrally, for example.

The next issue B faces is with Danish law prohibiting the advertisement of jewellery in teen magazines. Again, this is an MEQR under the Dassonville test, as it hinders the intra-community trade of this jewellery. In order to decide which justifications the Danish government can use, we look again at Cassis to check whether the measure is distinctly or indistinctly applicable. Here the measure is a blanket ban on advertising in Teen magazines, so is indistinct in its application, so both Article 36 derogations and Cassis requirements can be relied upon. Looking at paragraph 16 of Keck; which states that if the measure relates to the selling arrangements of the product, then they don't fall under Article 34. Firstly, the measure has to apply to all relevant traders operating within the national territories, which is true, as the Danish law prohibits all traders from advertising jewellery in teen magazines.

Also, it has to affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. Looking at the literal black letter of the law; the law does affect both kinds of traders in the same way. The more complex question of whether it affects both kind of traders in fact brings me to the joint cases of C-34-36/95

Konsumentombudsmannen (KO) v De Agostini (Svenska) Forlag AB and TV-Shop i Sverige AB as to whether there is ' differential impact'. These cases deal with the issue of access to the market as is faced here.

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In paragraph 43 of the judgment it is stated that blocking the most efficient method of advertising is of course going to adversely affect non-domestic goods producers more. In B's case, the magazine she wishes to advertise in is aimed at the target audience of her jewellery so would be efficient while being cheaper than paying for a national billboard or television campaign, and as domestic brands will be more well known to the people of Denmark than British brands, the prohibition of these adverts makes it more difficult to access the market (case C-254/98 Schutzverband gegen unlauteren Wettbewerb v TK-Heimdienst Sass GmbH). Again, the Danish government can use both Article 36 derogations and the Cassis mandatory requirements to justify the measure. From Article 36, they could use the protection of health of humans. From the Cassis requirements also they could use the 'protection of public health' derogation. These must satisfy the proportionality test of Walter Rau again.

We feel here the blanket ban on advertising greatly disadvantages non-domestic producers as explained above. Less restrictive measures could be used, such as the requirement of a health warning to be placed on the adverts, or again a public awareness campaign on body image and health. The final issue that meets B is when her products arrive in Poland. On the border, a batch of the jewellery is turned away because it is inconsistent with the higher standards of consumer protection in Poland.

These higher standards act as an MEQR because they restrict the harmonised measures set by the EU in their Directive 2009/48/EC; should B want to trade in Poland, she needs to invest further time and effort into her product, thus the Dasonville MEQR test is satisfied. Again, using Cassis, the <https://assignbuster.com/eu-law-age-discrimination-and-market-access-case-studies/>

measure is indistinctly applicable which means that the government can again use both Article 36 and Cassis to justify the measure. Again, looking at the mutual Recognition principal which dictates, “ Goods which are lawfully produced in one Member State cannot be banned from sale on the territory of another Member State, even if they are produced to technical or quality specifications different from those applied to its own products”, so the measure created by the Polish authorities conflicts with this. Judging by the reason already given, it is likely that they will rely on both the ‘ protection of health and life of humans’ derogation of Article 36, and ‘ protection of public health’ justification of Cassis. Directive 2009/48 EC sets a harmonised set of standards for toys which is the absolute minimum requirement, whereas the TFEU sets a limit on how much the Member States can further restrict their standards.

That is to say, Poland are free to expect higher standards as long as it doesn’t conflict with the Treaty’s aim, and the Cassis MEQR test. Knowing that these are MEQRs, we have to now test whether they are disproportionate restrictions on the Directive’s standards, and thus whether they come within the jurisdiction of Article 34 TFEU. On the face of it, the justification seems fair given the spate of deaths of toddlers, however, being a blanket ban it is very restrictive. From past case law, there seems to be a tendency of the ECJ to lean towards health warning labels, for example in Case C-178/84 Commission v Germany, where health labels were recommended, which are less restrictive but still achieve the aim required.

Though, due to the severity of the situation in Poland, it is possible that this alternative may not be found to be effective in reducing the deaths by the <https://assignbuster.com/eu-law-age-discrimination-and-market-access-case-studies/>

ECJ, so it could deem the higher standards proportionate. If any of the above measures are disproportionate MEQRs, she can rely on Article 34 in court in an action against the authority because it is directly effective according to the test put forward in the case of *van Gend en Loos*. This required four things, the provision to be sufficiently clear, which of course is applicable here as it is a short concise article stating the prohibition of quantitative restrictions and MEQRs. Next the article has to be unconditional, which it is. It must be based on negative obligation, which here it is requiring Member States not to do something (ie.

place quantitative restrictions or MEQRs on imports). Finally it must not require further legislation on the part of the Member State, which here it doesn't. B can thus use this legislation to launch action against the authorities, or continue business and use it as a defence, should the authorities launch action.